82699-4

No. 23247-6-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

NICHOLAS A. BAINARD,
Defendant/Appellant.

SECOND SUPPLEMENTAL BRIEF OF RESPONDENT/CROSS-APPELLANT

Gary A. Riesen
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I. STATEMENT OF THE CASE

Following the filing of briefs by the parties in the case at bar, a stay was granted by the court until the case of State v. Recuenco, 154 Wn.2d 156, 110 P.2d 188 (2005), was reviewed by the United States Supreme Court at 548 U.S. 212, 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006). The Washington State Supreme Court also filed a second opinion in this case on April 17, 2008, at No. 74954-7. (____ Wn.2d ____ (2008).)

Now the Court of Appeals requests additional supplemental briefing in reference to this case.

II. ARGUMENT

The United States Supreme Court found that in the Recuenco case, the failure to give the jury a sentencing factor was not an instructional error and the court could apply the harmless error analysis. *E.g.*, Neder v. United States, 527 U.S. 1 (1999). It was again before the state Supreme Court in which the court concluded:

> Recuenco was charged with assault with a deadly weapon enhancement, and he was convicted of assault with a deadly weapon enhancement, but he was erroneously sentenced with a firearm enhancement. We conclude that it can never be harmless to sentence someone for a crime not charged, not sought at trial, and not found by a jury. In this situation, harmless analysis does not apply.

Recuenco, ____ Wn.2d ____ at 19.

However, in the case at bar, the facts are completely different. As is established prior in the brief of respondent, Mr. Bainard had jury instructions which concluded that the firearm was in fact a deadly weapon, that it was a firearm, and that the jury had the option of finding Mr. Bainard guilty of the enhancement, with which he was charged. Therefore, Mr. Bainard should be sentenced to the firearm enhancement pursuant to the jury's finding that beyond a reasonable doubt he used a firearm in the murder of both of his parents. The firearm enhancement was properly pled and properly described to the jury. No exceptions were taken to the perfectly legitimate instruction which was given at the time of the trial. And, this case can be clearly distinguished from the Recuenco case in that the defense clearly had notice of

the firearm enhancement based upon the Second Amended Information filed in the case.

The defense chooses to ignore the fact that the finding was made by the jury in this matter, and not the judge, and the deadly weapon/firearm enhancement was used in this case. The defense ignores the fact that this finding was made beyond a reasonable as per the instructions. This is not an exceptional sentence and the court has not, at this point, overturned the use of penalty enhancements, such as firearms.

III. CONCLUSION

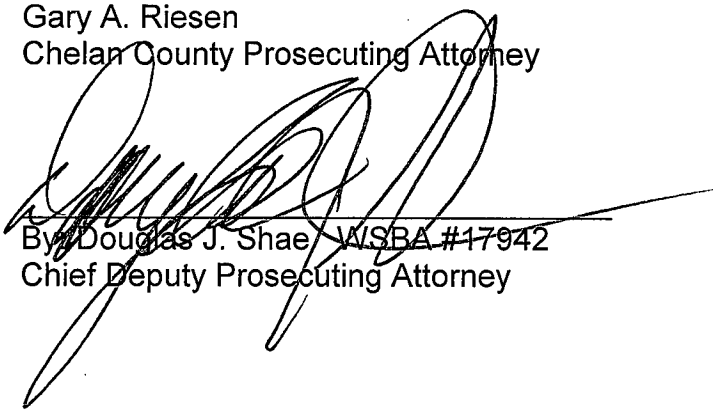
The case recently decided by the Washington State Supreme Court held that there could be no harmless error because the crime was not charged, not sought at trial, and not found by the jury, but that the judge on his own volition decided to make conclusions that the deadly weapon enhancement existed. This is clearly not the situation in the Bainard case. The enhancement was pled, was sought at trial, and was found by a jury. The proper instructions were given and defense counsel was given an opportunity to argue against the use of the firearm instruction to the

jury and also had an opportunity to object to the use of the instruction. There were no objections and Mr. Bainard's sentence in reference to the firearm enhancement should not be disturbed.

DATED this 27th day of June, 2007.

Respectfully submitted,

Gary A. Riesen
Chelan County Prosecuting Attorney



By Douglas J. Shae WSBA #17942
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